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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re B.W., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. B.P., Defendant and Appellant.	G041190 (Super. Ct. No. DP009512) O P I N I O N

Appeal from an order of the Superior Court of Orange County, John Gastelum, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

* * *

B.P. (father), the biological father of dependent B.W. (the child), appeals the court's denial of his Welfare & Institutions Code[1] section 388 petition. In his petition, father requested the court to modify a prior order denying placement of the child with father in Ohio and setting a section 366.26 hearing. Father asserts the court improperly denied the petition without conducting an evidentiary hearing. We affirm. Father did not make a prima facie case of changed circumstances or new evidence that would, if found to be true, justify modifying the court's previous order. He was therefore not entitled to an evidentiary hearing or relief under his section 388 petition.

FACTS

In December 2003, the child (age six at the time) was taken into protective custody based on his mother's inability to protect him from abuse by others. This initial dependency terminated in May 2006; the child's maternal aunt and uncle were approved as legal guardians. Father's whereabouts were apparently unknown to the court during the child's initial dependency.

In December 2006, a second dependency petition relating to the child (then nine years old) was filed pursuant to section 300, alleging general neglect and caretaker absence on the part of his guardians. Responding to the petition, the child's aunt and uncle stated they no longer wished to serve as guardians and did not want the child

[1] All statutory references are to the Welfare & Institutions Code, unless otherwise stated.

returned to their care because they thought he was making false allegations against them due to "coaching" by his mother. The court ordered the child detained and vested custody with the Orange County Social Services Agency (SSA). Father's whereabouts were still unknown; the court found SSA had exercised due diligence in its efforts to locate and provide notice of the dependency to father. In February 2007, the child was placed in a foster home. In June 2007, the court declared the child to be a dependent of the court, confirmed that custody should remain with SSA, approved SSA's placement of the child with the foster parents, and adopted SSA's recommendations for court-ordered services.

On July 10, 2007, father contacted SSA by telephone from Ohio. SSA's subsequent report indicated father "claimed he did not know about the child welfare proceedings concerning the child until recently, when [the child's grandfather] gave him the [SSA contact information]. [Father] said this morning (July 10), he received a letter from the Orange County Child Support Services demanding that he pay child support. He said, 'If I'm going to have to pay to support the child, I might as well have the child.' He asked if he could have immediate custody of the child. However, he also said he was not certain the child was his. [Father] said he never lived with the child's mother, but said they were casual friends for a two-month period. . . . [¶] [Father] said he saw the child once, seven years ago. He then began to voice concern about the child's welfare in foster care, stating that children should not have to grow up in out-of-home care. He said he would take custody of the child. [¶] Regarding his current situation, [father] said he was unemployed and living with his fiancée. [Father] said he was disabled with Post-Traumatic Stress Disorder, caused by a knife attack that he sustained. He said his fiancée was currently working full-time. [Father] said he had three other children living in the home with him . . . . [¶] [Father] said he would like the Court to order and pay for a paternity test so that the paternity of the father could be definitively determined. He also said that because he was unemployed, he could not afford to travel to California for

hearings, and requested that an attorney be appointed for him in absentia. He denied receiving previous messages or mail from [SSA] regarding the child's detention."

The court, following SSA's recommendation, delayed a scheduled section 366.26 hearing to allow time for paternity testing to occur and for the father to make an appearance in the proceeding. Paternity testing confirmed father was indeed the biological father of the child. The court conducted a section 366.26 hearing in October 2007, at which time it found the adoption of the child and termination of parental rights was not in the best interests of the child. The court approved a permanent plan of long-term foster care. In April 2008, SSA's review of the child's progress with the foster parents, who by this point sought legal guardianship of minor, was very positive: "The prospective legal guardians have raised the child . . . for the past thirteen months of his life. They provide the child . . . with a stable home, high quality of care, and an immense amount of love. Moreover, they have consistently requested that the Court appoint them his legal guardians." On April 28, 2008, the court granted the foster parents request to be given "de facto parent status," over the objection of father.

In May 2008, the court held a periodic review hearing, ruling: "[T]he court is mindful at this time that this child is in a permanent plan of long-term foster care, and at no time since October, in any event, if not earlier, was this a family reunification case. [¶] . . . [¶] At this point in this periodic review, the court has to consider all the permanent plan options including a return to the parents, adoption, and legal guardianship. [¶] As far as a return to the custody or the home of either parent, the court finds that this is not an option or not in the best interest of the child. This court is required to order and set a 366.26 hearing if a more permanent plan is available for the minor and if there is no clear and convincing evidence to show that setting a 366.26 hearing is not in the best interest of the child. And the court can only do that if it was going to return the child to one of the parents or if the court could find that the child is not a proper subject of adoption or if there was no one willing to accept legal

guardianship of the minor. [¶] And here, the court is satisfied it does have evidence before it that the current caretakers do wish to be considered as the minor's legal guardians. So there is a more permanent plan available other than long-term foster care for this child."

The court continued: "Turning to the issue of the return to the . . . father . . . the evidence before [the court] clearly shows that the father is not an appropriate person to return the child to at this time and it would clearly not be in the child's best interest to return the child to the father at this point. The father and the child really have no relationship other than a few phone calls. [¶] In clear terms they are virtual strangers. . . . [¶] This man apparently has never even met this child even though this child is eleven. He has shown no real involvement in this child's life whatsoever aside from those recent phone calls. He has said on more than one occasion that he is willing to work a case plan but he's made no efforts to do so. He takes no responsibility for his failure to be a part of this child's life for an 11-year period and instead takes the easier route of [pillorying] the social worker . . . . [¶] Father has said at various times that he didn't know whether or not he was the father. He was uncertain about it, and he requested a paternity test. The court is not convinced regarding father's claims that he's made at various times that he didn't know the child existed. I think there is sufficient evidence to show that he was aware . . . he could be the father of this child. [¶] [E]ven with the full knowledge of all of mother's problems that he claimed he needed to distance himself from, he was content to leave the child in the mother's care, and even went on to admit that [the] decision . . . he made was not in fact in the best interest of this child. So to state that he's a non-offending parent is absolutely ludicrous. This man is no Ward Cleaver."

"I can also point to [evidence suggesting] the father knew about a prior dependency case involving the minor about four years ago and told the child's then attorney that, quote, he didn't want anything to do with [B.W.], end quote. [¶] There are

reports here about father's prior incarceration and abuse of illegal substances, and father had an opportunity to respond to that and definitely didn't deny that he had that history. [¶] I'm also concerned about the child's reactions after father's phone calls. . . . [¶] . . . [¶] There's no evidence here that the father is prepared to deal with or understands or has the ability to care for this child's unique behavioral challenges, and those problems are well-documented in the Social Services reports. If anything, the evidence shows that this father faces a number of personal challenges of his own. And those [include] episodic panic attacks; that he was placed on medication and then later two other medications because of uncontrolled symptoms; medications were stopped apparently because father got worse emotionally and psychologically; then he was put on a simple regimen of psychotropics . . . . [¶] . . . [¶] [The child] has even commented in the reports [that] he's not even sure he wants to live with the father because for one reason Ohio is so far away from California. [¶] So I don't know how I could possibly find at this time based on the state of the evidence that it would be in this child's best interest to return to the care of the father at this point."

The court was critical of the SSA social worker for delaying the initiation of an ICPC (Interstate Compact for the Placement of Children) review of father's home in Ohio. But the court found the social worker's "ineptitude" to be "of no moment given [the court's] finding that father is in no position to take the child at this time." Indeed, the court noted in denying a motion for a continuance of the review hearing that "even [if] the result[] of that ICPC . . . was the most favorable outcome with respect to the father, . . . assuming the best case scenario, it appears we would be in pretty much the same place we are now."

In October 2008, shortly before a scheduled section 366.26 hearing to terminate parental rights, father petitioned pursuant to section 388 to change the court's previous May 2008 orders denying father's request for custody of minor and setting the dependency case for the section 366.26 hearing. The petition alleged the following

changed circumstances or new facts: "Since the May 15, 2008 ruling, an ICPC Homestudy has been completed of the father's home in Ohio, with favorable findings. Additionally, the father has maintained regular and consistent phone calls with the child. The child and the father have been developing a positive relationship with each other through their regular contact." The petition requested the court modify its previous order by placing the child in father's home under a family maintenance plan and vacating the scheduled section 366.26 hearing. The petition stated the requested modifications would be in the best interests of minor because "[t]he child has enjoyed reacquainting himself with his father . . . and his paternal uncle. . . . The child has expressed his desire to reside with his relatives . . . . The child wants and needs his family connection and his father can and will provide the child with permanence once and for all." Father supported his petition with his own declaration, attaching several notes from his doctor and wife.

The court rejected father's section 388 petition on the day it was filed, finding the petition "fail[ed] on both prongs" of the section 388 analysis. The court characterized the father's continuing attempts to build a relationship with minor over the phone as, at best, "changing circumstances as opposed to changed circumstances." Further, the court indicated it would be speculation for it to simply assume on the record before it that the ICPC would be approved; the petition's assertion of "favorable findings" was based on father's attestation to statements allegedly made by an Ohio social worker who was working on the ICPC. Finally, the court concluded father had not made any showing that a change to its previous orders was in the best interests of the child (as opposed to the best interests of father). Although the court examined the declarations submitted with the petition and allowed oral argument (thereby conducting a "hearing"), the court did not grant father's request for live testimony to be taken from the child and other witnesses at a noticed "evidentiary hearing."

DISCUSSION

Father contends the court erred in denying his request for a full evidentiary hearing on his section 388 petition.[2] The court's denial of the "section 388 petition without a hearing is reviewed for abuse of discretion. [Citations.] We must uphold the juvenile court's denial of appellant's section 388 petition unless we can determine from the record that its decisions '"exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."'" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

"Section 388 provides the 'escape mechanism' . . . built into the [dependency] process to allow the court to consider new information." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Under section 388, subdivision (a), "[a]ny parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered . . . for a hearing to change, modify, or set aside any order of court previously made . . . ."

"If the petition states a change of circumstance or new evidence and it appears that the best interest of the child may be promoted by the proposed change of order or termination of jurisdiction, the court may grant the petition" after conducting a noticed hearing within 30 days after the petition is filed. (Cal. Rules of Court, rule 5.570(e)-(g); § 388, subd. (d).) "A petition for modification must be liberally construed in favor of its sufficiency." (Cal. Rules of Court, rule 5.570(a)(1); see *In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-310.) But "if the liberally construed allegations of the petition

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[2] SSA also characterizes the court's ruling as a "summary den[ial]," despite the court allowing oral argument by the parties and reviewing father's evidentiary submissions along with the petition before making its "ex parte" ruling.

do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; see Cal. Rules of Court, rule 5.570(d) [court may deny the section 388 petition "ex parte" if petition fails to state change of circumstance or new evidence, or that requested modification would promote the best interest of the child].)

The court was well within its discretion in denying father's section 388 petition without a full evidentiary hearing. Father's petition did not establish a change in circumstances or other new evidence that would suggest a modification of the court's previous orders would promote the child's best interests. The court had already considered and rejected the possibility that a favorable ICPC study could make a difference in its decision to reject placement of minor with father or to otherwise delay a permanent plan of guardianship with the foster parents. As to father's continued phone conversations with the child, the court aptly characterized the relationship between father and the child as a "changing" circumstance rather than a "changed" circumstance. (See *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072 ["At best, his petition showed the circumstances were changing, which is insufficient to warrant a hearing on a section 388 modification petition"].)

In May 2008, the court fully articulated the reasons why it would not be in the child's best interests for him to be placed in the custody of father, notwithstanding the biological ties between the child and father. There were simply too many concerns with father to merit changing the child's successful placement with his foster parents, such as father's previous lack of interest or involvement in the child's life, father's mental health issues, father's prior illegal drug use and incarceration, father's residence in Ohio, and the lack of evidence suggesting father was capable of managing the child's behavioral

problems. No new information in the petition undermines the court's determination of the child's best interest in May 2008.

Father cites *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 848-849, and *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1118, for the proposition that "[a]bsent a showing of unfitness as a parent, the child's well-being is presumptively best served by continuation of the father's parental relationship." But both of these cases involve fathers who, as soon as they became aware of the existence of babies fathered by them out of wedlock, immediately took responsibility for the welfare of their children and attempted to achieve "presumed father" status under the Family Code. Here, the court made a factual finding, supported by substantial evidence and not explicitly challenged on appeal, that father intentionally evaded his parental responsibilities long after he was aware of the child's existence. The court properly made its rulings based on its finding of the child's best interest; the constitutional concerns discussed in *Adoption of Kelsey S.*, *supra*, 1 Cal.4th 816, and *In re Baby Boy V.*, *supra*, 140 Cal.App.4th 1108, have no applicability to this case.

Finally, father claims his procedural due process rights were violated by the court's failure to allow live testimony at a hearing on his section 388 petition. (See *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1404-1405 [failure to allow live testimony at section 388 hearing when clear credibility contest existed was abuse of discretion].) But father already received due process at the May 2008 hearing, at which time the social worker was cross-examined by father's attorney and father had a full opportunity to litigate the merits of the placement issues before the court. Father was not entitled to another evidentiary hearing on the same issues unless he met the prima facie threshold set by section 388. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461 [structure of section 388 provides adequate due process; "real issue" is whether "requisite prima facie showing" is made by petitioner].) As already explained above, the court here was within its discretion

when it concluded there were no changed circumstances or new facts which would justify another hearing on the same questions decided five months earlier.

DISPOSITION

The order denying father's section 388 petition is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.